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Female Genital Mutilation and Refugee Status in the United States—a Step in the Right Direction

INTRODUCTION

On May 10, 1994 the Canadian Immigration and Refugee Board (IRB) granted refugee status to Khadra Hassan Farah, a Somali mother, and her daughter, based on the claim that the ten-year-old faced ritual female genital mutilation (FGM) if forced to return to Africa.¹ Farah stated that in Somalia her ex-husband would take custody of her daughter and that she would have been powerless to stop her daughter from being mutilated.² Although France was the first Western nation to establish FGM as a form of persecution for United Nations Convention refugee status,³ the Canadian decision marks the first country to grant such status as part of its conventional refugee procedure.⁴ The IRB based its decision on Refugee Board Guidelines introduced in March 1993, which permit females to claim refugee status on the basis of gender-related persecution.⁵

Canada and the United States have adopted the United Nations 1951 Convention Relating to the Status of Refugees.⁶ The Convention defines a refugee as someone who has a well founded fear of being persecuted for reasons of race, religion, nationality, membership in a particular social group, or political opinion.⁷ An alien qualifies for

¹ Convention Refugee Determination Decisions No. T93-12198, T93-12199, T93-12197 at 7, 10 (May 10, 1994) [hereinafter *Farah* case]. Farah's seven-year-old son was also granted refugee status. *Id.* at 13. Although the names are omitted from the case, because of the notoriety that Farah's case spurned, it is self-evident that this IRB decision refers to her.

² *Id.* at 3.

³ See *infra* text accompanying note 7.

⁴ See Clyde H. Farnsworth, *Canada Gives Somali Mother Refugee Status*, HOUSTON CHRONICLE, July 21, 1994, at 14, available in LEXIS, Canada Library, Allnws File.

⁵ *Farah* case, *supra* note 1, at 4; see also Immigration and Refugee Board, *Women Refugee Claimants: Fearing Gender-Related Persecution*, Guidelines Issued by the Chairperson Pursuant to Section 65(3) of the Immigration Act (Ottawa, Canada March 9, 1993) [hereinafter IRB Guidelines].

⁶ Convention Relating to the Status of Refugees, July 28, 1951, art. 1(A)(2), 189 U.N.T.S. 137 [hereinafter Refugee Convention].

⁷ *Id.*

political asylum in the United States and Canada if she meets one of the Convention grounds for determining refugee status.⁸ Accordingly, the claimant must establish that she has been persecuted in the past or has a fear of future persecution, that her fear is well-founded, that she will be persecuted by the government or an individual or group that the government is unwilling or unable to control, and that the feared persecution is on account of one of the five enumerated grounds.⁹ While gender is absent from the enumerated grounds, Canada and other states that are party to the Convention have recognized that the Convention definition of refugee incorporates gender-related claims of women asylum applicants.¹⁰ In the United States, under landmark guidelines issued in May 1995 by the Immigration and Naturalization Service (INS), women who claim persecution because of gender may have a successful case.¹¹ The guidelines are based largely on those proposed by the Women's Refugee Project of Cambridge, Massachusetts, which explained that gender-related persecution may constitute a *type* of harm particular to a female claimant's gender, or the persecution may be imposed on the applicant *because* of her gender.¹²

Until the recently issued guidelines, the United States, unlike Canada, had not recognized the threat of FGM as a basis for gender-related persecution.¹³ Rather, U.S. caselaw defined persecution based mostly on the experiences of male claimants. Other than a few cases of rape, the definition had not been widely applied to female-specific experiences, such as FGM.¹⁴ Presently, FGM is not illegal in the United States, although legislation introduced by Colorado Representative Patricia Schroeder criminalizes FGM performed on girls under eighteen and requires Health and Human Services to identify and educate communities in the United States that practice FGM, make recommendations to medical schools for treatment of its complications, and com-

⁸ U.S.C. § 1101(a)(42)(A)(1988); Immigration Act, R.S.C. ch. 28, § 2(1) (4th Supp. 1988).

⁹ Refugee Convention, *supra* note 6.

¹⁰ IRB Guidelines, *supra* note 5, at 1.

¹¹ Judith Gains, *INS Eases Asylum Guidelines for Women*, BOSTON GLOBE, May 27, 1995, at 13.

¹² *Id.*; Women's Refugees Project, Harvard Immigration & Refugee Program/Cambridge & Somerville Legal Services, *Guidelines for Women's Asylum Claims*, at 1, 2 [hereinafter U.S. Guidelines]; Sally Jacobs, *Persecution Based on Sex Viewed as a Cause for Asylum*, BOSTON GLOBE, Apr. 8, 1994, at 1.

¹³ See *infra* discussion Part III.

¹⁴ IRB Guidelines, *supra* note 5, at 7; U.S. Guidelines, *supra* note 12, at 3.

pile statistics on women living in the United States who have undergone it.¹⁵

In a case similar to Farah's brought in Portland, Oregon, a federal immigration judge annulled an expulsion order in March 1994 which would have deported Lydia Oluloro, a Nigerian woman living illegally in the United States, and her two daughters.¹⁶ Ms. Oluloro's fear that her American-citizen daughters, ages four and six, would be subject to FGM if deported to Nigeria, was the basis for that ruling.¹⁷ This order, however, merely provided a procedure to stay her pending deportation, and did not provide a grant of refugee status.¹⁸

More recently, two judges issued strikingly different rulings on female claimants' requests for political asylum in the United States.¹⁹ The two cases involved African women, both from Sierra Leone, who were abducted, gagged and bound, and then had their genitalia partly cut away with a knife. They were sworn to secrecy not to reveal what had been done to them or face death by witchcraft.²⁰ An Arlington, Virginia judge declared that the woman before him suffered "an atrocious form of persecution" and granted her asylum, while a Baltimore, Maryland judge denied the other woman's request, suggesting that she could choose to support the practice to maintain tribal unity.²¹ The disparity demonstrates that there is no set formula in applying the new guidelines. Immigration officials stressed that the requirements for proving persecution remain strict: a woman still must show that she has a well-founded fear of persecution based on being a member of a social group.²² While not every woman who makes a gender-based claim will qualify as a refugee, at least the guidelines will sensitize the immigration judges and officials to women's sexual persecution.²³

FGM dates back to the time of the Egyptian Pharaohs, and cuts a wide band across sub-Saharan Africa, regardless of religious or cultural

¹⁵ H.R. 941, 104th Cong., 1st Sess. (1995); Pat Schroeder, Congressman, *House Passes Resolution on Female Genital Mutilation*, CONGRESSIONAL PRESS RELEASE, June 7, 1995, available in LEXIS, News Library, Curnws File.

¹⁶ *In re* Lydia Omowunmi Oluloro, In Deportation Proceedings, Portland Oregon, No. A72 147 491 at 20 (Mar. 23, 1994) (oral decision).

¹⁷ *Id.* at 17.

¹⁸ *See id.* at 20.

¹⁹ Pamela Constable, *INS Debates Female Mutilation as Basis for Asylum*, THE WASHINGTON POST, Sept. 11, 1995, at D1.

²⁰ *Id.*

²¹ *Id.*

²² *Id.*

²³ *Id.*

boundaries.²⁴ Although it takes mere seconds to slice away a woman's genital organs, the pain extends far beyond the procedure. Many of the eighty-five to 110 million women who have suffered through FGM endure infection, constant pain, painful intercourse, infertility, and dangerous childbirth.²⁵ While proponents argue that FGM is part of culture or tradition, the underlying purpose of FGM is to control a woman's sexual appetite in order to maintain her virginity and thus her marriageability.²⁶ Moreover, despite the pain and physical and emotional consequences, mothers enforce the ritual to adhere to tradition and to ensure that their daughters marry well.²⁷

This Note argues that FGM is a form of gender-related persecution, and if a woman has a well-founded fear of facing FGM in her home country, then she has a valid claim for asylum and refugee status in the United States based on her membership in a particular social group. Part I of this Note details the background of FGM. It describes the types of FGM, proponents' views of the mutilation, and the effects and results of FGM. Part II provides an overview and analysis of the IRB Guidelines adopted by Canada as well as a brief synopsis of Canadian caselaw since the guidelines were adopted. Part II also reviews Farah's case in detail and its conclusion that fear of FGM is a gender-related form of persecution. Part III summarizes United States caselaw and guidelines as well as the *Oluloro* decision. Part IV analyzes the guidelines that were proposed by the Women's Refugee Project, which the INS largely adopted, in light of the Canadian IRB Guidelines and the *Farah* case. Although the United States and Canadian guidelines are not legislatively binding, they are the first to address the problems caused by the Convention's failure to explicitly recognize gender as an enumerated basis for refugee status. This Note concludes that the INS appropriately followed Canada's lead to allow women fleeing persecution based on gender, namely FGM, to qualify as refugees.

I. DISCUSSION/BACKGROUND

A. *Types of Female Genital Mutilation*

One afternoon, a group of women, including my mother and aunts, gathered at our house so that they could circumcise

²⁴ Shannon Brownlee et al., *In the Name of Ritual*, U.S. NEWS AND WORLD REPORT, Feb. 7, 1994, at 56, 57.

²⁵ *Id.*

²⁶ *Id.*

²⁷ *Id.* at 58.

me and my cousin. . . . I was told that it is a common thing and that it would enhance my chances of getting married [sic] to a good man. They took me into an empty room and tying [sic] my arms behind my back. Two pairs of women grabbed my legs and spread them wide open. They held my legs very tight so that I would not be able to move them. Then, another lady started to get a new blade and took the cover off it. . . . She inserted her fingers into my inside to search for my clitoris. She got a good grip of my clitoris and started to pull it out, and I felt the pain and started to scream. She cut off my clitoris with the blade and I screamed more and more. This did not deter her nor did it make her to stop cutting my body any further. She continued slicing away my labia minor at which point, I lost consciousness. Subsequently, she scraped raw the wall of my vulva and bound them together with thorns. She place [sic] a stick between the raw walls of my vulva so that I would have barely sufficient means to expel my bodily wastes. I woke up in the middle of the night and realized that my legs were tied together to restrain me from any movement. I also saw my cousin lying next to me with her legs also tied together. We were not allowed to urinate for two days and we were not given any liquids to drink. My legs were left tied together for ten days after which time I started to walk again with great difficulty and pain. Even though this event took place over twenty years ago, I can still easily visualize the scene and feel the pain and trauma all over again when I start to talk about it.²⁸

The above narrative describes infibulation, one of the three methods of FGM.²⁹ It does not depict a fictional event, or a ritual practiced centuries ago and since discontinued. Rather, the narrative describes the mutilation of Khadra Hassan Farah, a Somali woman who was

²⁸ *Farah case*, *supra* note 1, at 9–10.

²⁹ Although there are three methods of FGM, I use the terms FGM and female circumcision throughout this Note to encompass all three methods. The extent of the mutilation depends on the local custom, the tools used, and the cleanliness of the surroundings. Please note that despite the similar wording, female circumcision is not the equivalent of male circumcision. When a male is circumcised, only a small piece of skin is removed from the penis; female circumcision, however, involves the removal of the external reproductive organs. See FRAN P. HOSKEN, *Male Circumcision*, in *THE HOSKEN REPORT: GENITAL AND SEXUAL MUTILATION OF FEMALES 1* (2d ed. 1979). Moreover, while male circumcision is said to prolong the act of sex and thus increase the male's pleasure, the purpose of FGM is to extinguish the woman's pleasure, and may even result in painful intercourse. HOSKEN, *supra*, *Medical Facts and Summary*, at 1.

granted political asylum in Canada in May 1994.³⁰ Farah applied for political asylum in order to protect her daughter from the same mutilation that she experienced when she was only eight years old.³¹

FGM refers to three genital operations that entail incision, and usually removal, of all or part of the female external genitalia.³² The first of the operations, called clitoridectomy, or *sunna*, meaning tradition in Muslim countries, is the least severe.³³ A clitoridectomy consists of the removal of the clitoral prepuce,³⁴ leaving intact the larger parts of the labia minora.³⁵

The second type of operation, called excision, consists of the entire removal of the clitoris and the labia minora.³⁶ The labia majora is left intact, and the vulva is left unsewn.³⁷ Some performers of excision make additional cuts to enlarge the opening of the vagina.³⁸ This is believed to make childbirth easier, but it actually has the opposite result.³⁹

Infibulation, as described above, is the most severe operation. Infibulation is known as "Pharaonic circumcision" because it traditionally has been practiced in upper Egypt.⁴⁰ When a woman is infibulated, her entire clitoris and labia minora are removed.⁴¹ The sides of the labia majora are then sewn together with thorns, and the woman's legs are bound together from thigh to ankle for twenty days or more in order to allow scar tissue to form.⁴² A tiny opening the size of a

³⁰ Jennifer Bingham Hull, *Battered, Raped and Veiled; The New Sanctuary Seekers; Women Increasingly Are Asking for Asylum from Gender-Based Abuse, Forcing the U.S. to Re-Examine its Immigration Policy*, L.A. TIMES, Nov. 20, 1994, at 26, available in LEXIS, Canada Library, Allnws File.

³¹ *Id.*

³² Note, *What's Culture Got to Do with It? Excising the Harmful Tradition of Female Circumcision*, 106 HARV. L. REV. 1944, 1946 (1993) [hereinafter, *What's Culture Got to Do with It?*]. The female genitalia are comprised of the clitoris and the clitoral prepuce, the labia majora (large lips of the vagina), and the labia minora (small lips of the vagina). *Id.*

³³ OLAYINKA KOSO-THOMAS, *THE CIRCUMCISION OF WOMEN: A STRATEGY FOR ERADICATION* 16 (1987); RAQUYA HAJI DUALEH ABDALLA, *SISTERS IN AFFLICTION: CIRCUMCISION AND INFIBULATION OF WOMEN IN AFRICA* 8 (1982).

³⁴ The prepuce is the foreskin protecting the clitoris. KOSO-THOMAS, *supra* note 33, at 16.

³⁵ *What's Culture Got to Do with It?*, *supra* note 32, at 1946.

³⁶ *Id.*

³⁷ *Id.* at 1946-47.

³⁸ *Id.*

³⁹ HOSKEN, *Medical Facts and Summary*, *supra* note 29, at 2.

⁴⁰ *Id.*

⁴¹ *What's Culture Got to Do with It?*, *supra* note 32, at 1947.

⁴² See EFUA DORKENOO & SCILLA ELWORTHY, *FEMALE GENITAL MUTILATION: PROPOSALS FOR CHANGE* 7 (3d ed. 1992).

matchstick or fingertip is left for the passage of menstrual blood and urine.⁴³

B. *Where FGM is Practiced and by Whom*

FGM is performed by different practitioners depending on the area. Generally, it is performed by "traditional surgeons" or "traditional birth attendants."⁴⁴ The circumcision may be performed privately within the family, or it may be part of a public puberty or initiation ceremony.⁴⁵ It may be conducted with much ritual or no ritual, and may take place in houses, huts, or the open air.⁴⁶ Anesthetics are rarely used, and all three types of operations may be performed with knives, razor blades, or pieces of glass, none of which are usually sterilized.⁴⁷ Several babies may be handled successively and operated on with the same blade.⁴⁸ After the mutilation, the incision is treated with a native soap, palm oil, vaseline, kerosene, or engine oil.⁴⁹

The total number of women and girls subjected to FGM range from eighty-five to 114 million.⁵⁰ By some estimates, Somalia alone may have seventy-four million victims.⁵¹ FGM is performed on females as early as infancy and as late as just prior to marriage or childbirth.⁵² While there is no compilation of statistics for each country,⁵³ FGM prevails

⁴³ See FEMALE CIRCUMCISION, EXCISION AND INFIBULATION: THE FACTS AND PROPOSALS FOR CHANGE 3 (Scilla McLean ed., 1980) [hereinafter FEMALE CIRCUMCISION, EXCISION AND INFIBULATION].

⁴⁴ See Robert A. Myers et al., *Circumcision: Its Nature and Practice Among Some Ethnic Groups in Southern Nigeria*, 21 SOC. SCI. & MED. 581, 585 (1985); NAHID TOUBIA, FEMALE GENITAL MUTILATION: A CALL FOR GLOBAL ACTION 29 (1993). Medically trained nurses and midwives have replaced some traditional practitioners in recent years using medical supplies given to them by health ministries or UNICEF programs. TOUBIA, *supra*, at 29. This demonstrates that FGM, although rooted in tradition or culture, is merely a method of controlling women. See *infra* text accompanying notes 62–70.

⁴⁵ LILLIAN PASSMORE SANDERSON, AGAINST THE MUTILATION OF WOMEN: THE STRUGGLE TO END UNNECESSARY SUFFERING 20 (1981).

⁴⁶ *Id.*

⁴⁷ FEMALE CIRCUMCISION, EXCISION AND INFIBULATION, *supra* note 43, at 3; *What's Culture Got to Do with It?*, *supra* note 32, at 1947.

⁴⁸ *What's Culture Got to Do with It?*, *supra* note 32, at 1947.

⁴⁹ Myers et al., *supra* note 44, at 586.

⁵⁰ TOUBIA, *supra* note 44, at 21.

⁵¹ Pat Swift, *Women Worldwide Join Forces to End a Chilling Atrocity*, BUFFALO NEWS, Nov. 20, 1993, at 7, available in LEXIS, Canada Library, Allnws File.

⁵² *Id.*; see *infra* notes 71–79 and accompanying text.

⁵³ The United Nations does not collect statistics on FGM, demonstrating how women's issues are neglected. TOUBIA, *supra* note 44, at 22.

across sub-Saharan Africa, north of the equator.⁵⁴ FGM is practiced in at least twenty-six African countries, among a few groups in Asia, and among African immigrants in North and South America, Australia, and Europe.⁵⁵ Although Muslims, Christians, some animists, and one Jewish sect practice FGM, it is not a requirement of any of these religions.⁵⁶ Clitoridectomy is the most common procedure, but infibulation predominates in Somalia, Djibouti, northern Sudan, southern Egypt, and coastal areas of Ethiopia.⁵⁷

C. *Reasons for FGM*

Proponents of female circumcision offer several reasons for its continuance. Among these are the maintenance of tradition, the promotion of social and political cohesion, the enhancement of fertility, the fulfillment of religious requirements, the prevention of promiscuity, the preservation of virginity, the maintenance of feminine hygiene, and the pursuit of aesthetics.⁵⁸ Similar or identical justifications are offered by adherents to the tradition throughout Africa.⁵⁹ "It is the custom," is the reason given most often.⁶⁰ In a traditional environment, people do not question practices and customs, and, accordingly, are convinced that the mutilations are necessary.⁶¹

1. Tradition

The age-old practice symbolizes the shared heritage of a particular ethnic group, rendering circumcised females socially acceptable.⁶² For example, women and girls who have not endured some type of FGM

⁵⁴ *Id.*

⁵⁵ *Id.* at 21.

⁵⁶ *Id.*

⁵⁷ *Id.* at 22.

⁵⁸ *What's Culture Got to Do with It?*, *supra* note 32, at 1949.

⁵⁹ *Id.*; HOSKEN, *The Reasons Given*, *supra* note 29, at 1–16. This Note discusses female genital mutilation as it is practiced generally.

⁶⁰ HOSKEN, *The Reasons Given*, *supra* note 29, at 2.

⁶¹ *See id.* at 1.

⁶² *See* KOSO-THOMAS, *supra* note 33, at 8; *What's Culture Got to Do with It?*, *supra* note 32, at 1949. For example:

In Akwa Ibom [State] and in villages in the Calabar area of Cross River State, uncircumcised women face derision when they quarrel with their more numerous circumcised sisters. A woman will make a particular clicking sound with her tongue during a disagreement, implying that the woman she is arguing with is uncircumcised. If the

are shunned as unclean, oversexed, and unmarriageable.⁶³ One woman of the Meru tribe of Kenya recalled her circumcision “as if it was something sweet,” proving that she was a member of her community.⁶⁴

Mothers perpetuate the tradition in order to ensure a good marriage for their daughters.⁶⁵ Throughout Africa where FGM is practiced, “no man will marry an uncircumcised girl.”⁶⁶ Clearly, the African men constitute the true reason for the continuation of the mutilations.⁶⁷ The custom subordinates women, admonishing them to be submissive and servile, while enhancing male superiority and control.⁶⁸ The myths, rituals, stories, embellishments, and festivals all serve to disguise the facts and make FGM easier to promote.⁶⁹ By allowing the mutilations to continue, patriarchal power is preserved, at no cost to men, but at a great price to women and girls.⁷⁰

2. Fertility and Childbirth

Another justification for FGM is that it enhances fertility and successful childbirth. For example, women in the Isojo and Urhobe communities of the Delta state are circumcised in the latter part of their first pregnancy.⁷¹ According to legend, if the first-born child’s head touches the clitoris during childbirth, the child will die.⁷² If the expectant mother is left uncircumcised, the clitoris will “cause symbolic or spiritual injury to the baby.”⁷³ For these tribes, FGM is done when the woman is at least seven months pregnant, and is performed by the woman’s husband, who is proud that he not only devirginized his wife, but circumcised her as well.⁷⁴

woman is indeed uncircumcised, she is shamed by the act. But so serious is the insult that if a woman is circumcised then the woman who insulted her would be fined.

What’s Culture Got to Do with It?, *supra* note 32, at 1950 (quoting Harriet Lawrence, *Excising a Harmful Tradition*, GUARDIAN, June 11, 1992, at 9).

⁶³ Brownlee et al., *supra* note 24, at 58.

⁶⁴ *Id.*

⁶⁵ *Id.*

⁶⁶ HOSKEN, *The Reasons Given*, *supra* note 29, at 15.

⁶⁷ *Id.*

⁶⁸ *Id.* at 2.

⁶⁹ *Id.* at 15.

⁷⁰ *Id.*

⁷¹ *What’s Culture Got to Do with It?*, *supra* note 32, at 1950.

⁷² See Myers et al., *supra* note 44, at 584–85.

⁷³ *Id.*

⁷⁴ *What’s Culture Got to Do with It?*, *supra* note 32, at 1950 n.49.

Despite evidence⁷⁵ that uncircumcised women deliver healthy babies, those who perform the excision argue that FGM is still required to ensure a safe delivery.⁷⁶ They disregard the evidence which indicates that circumcision causes infertility and is even more dangerous during pregnancy, claiming that they have never experienced any problems themselves.⁷⁷ Finally, "[they] cannot afford not to circumcise [their] women," due to the cultural demands.⁷⁸ The practice continues, leading to a contradictory result: ethnic groups that are genuinely concerned about ethnic continuity are adhering to a tradition that threatens the fertility of women.⁷⁹

3. Religious Grounds

Adherence to religion is also a popular justification for FGM, but neither Christian nor Islamic dogma requires such mutilation.⁸⁰ In fact, female circumcision is not required by *any* formal religious doctrine.⁸¹ Proponents argue that modesty and virginity are valued highly in African societies as well as in the Bible and the Koran.⁸² In order to maintain and promote modesty and the virginity of young girls until they marry, the clitoris, which is believed to make women promiscuous,⁸³ must be removed.⁸⁴ Yet the proponents cannot identify any religious text to support their argument.⁸⁵ Not only is there a lack of

⁷⁵ See discussion *infra* part I.D.

⁷⁶ *What's Culture Got to Do with It?*, *supra* note 32, at 1950–51.

⁷⁷ *Id.* at 1951.

⁷⁸ *Id.* (quoting Sam Eferaro, *Why We Circumcise Our Pregnant Women*, VANGUARD, Jan. 19, 1993, at 10).

⁷⁹ *What's Culture Got to Do with It?*, *supra* note 32, at 1951.

⁸⁰ *Id.*

⁸¹ Alison T. Slack, *Female Circumcision: A Critical Appraisal*, 10 HUM. RTS. Q. 437, 446, 457 (1988). The Bible only refers to male circumcision. See Genesis 17:10 (King James) ("This is my covenant, which ye shall keep, between me and you and thy seed after thee; Every man child among you shall be circumcised."); Galatians 5:6 (King James) ("For in Jesus Christ neither circumcision availeth anything, nor uncircumcision; but faith which worketh by love.").

⁸² *What's Culture Got to Do with It?*, *supra* note 32, at 1951.

⁸³ The clitoris is believed to induce women to make uncontrollable sexual demands on their husbands. KOSO-THOMAS, *supra* note 33, at 8. If her husband does not meet these demands, the woman will seek extra-marital affairs. *Id.* Such an argument wrongfully assumes that the sexual control and subjugation of women is beneficial to women and would lead to a better society. *What's Culture Got to Do with It?*, *supra* note 32, at 1952. Moreover, it assumes that males have no control over their own sexuality and makes one wonder why there are not varying degrees of male circumcision (i.e. castration) to control male promiscuity and ensure male fidelity. *Id.*

⁸⁴ *Id.*

⁸⁵ *Id.* at 1951–52.

religious justification and doctrine, the argument uses religion to promote fear, oppression, and exploitation—a “complete antithesis of the ideals that religion should promote.”⁸⁶

4. Hygiene and Aesthetics

Advocates also justify female circumcision on hygienic or aesthetic grounds.⁸⁷ Circumcision does not lead to cleanliness. Rather, it may result in urine retention and an accumulation of menstrual blood that may lead to infection, discomfort, and offensive odors.⁸⁸ In addition, the resulting scars can hardly be thought of as contributing to beauty. “Many Somali women, when they go to the hospital before giving birth, have been made to feel like freaks . . . [d]octors and nurses come running, to stare at them.”⁸⁹ A hardened scar and stump is left in place of the clitoris, and if the woman has been infibulated, all that remains of her genitals is taut skin with an ugly long scar down the middle.⁹⁰ Only those who have been conditioned to view FGM as aesthetically pleasing could find it to be so.⁹¹

D. *The Effects of FGM*

The effects of FGM vary with the type of operation, the sanitary conditions of the operation, and the demeanor of the woman or child during the operation.⁹² The adverse effects can be severe with any form of FGM, but the problems are exacerbated by excision and infibulation.⁹³ There are serious health problems, both physical and psychological. Because some effects are not immediately apparent, the woman or child, her parents and family, the community, and the practitioner may not acknowledge the causal connection between the operation and the complications that materialize years later.⁹⁴

⁸⁶ *Id.* at 1952.

⁸⁷ KOSO-THOMAS, *supra* note 33, at 7; *What's Culture Got to Do with It?*, *supra* note 32, at 1953; see *infra* part I.D.2.

⁸⁸ KOSO-THOMAS, *supra* note 33, at 10; *What's Culture Got to Do with It?*, *supra* note 32, at 1953.

⁸⁹ Judy Steed, *Mission to Stop Female Genital Mutilation: Health Workers Fear Girls Could Die Because of Practices Done in Secret*, TORONTO STAR, Nov. 13, 1994, at E4, available in LEXIS, Canada Library, Allnws File.

⁹⁰ KOSO-THOMAS, *supra* note 33, at 10.

⁹¹ *Id.*

⁹² *Id.* at 25.

⁹³ Slack, *supra* note 81, at 450.

⁹⁴ *What's Culture Got to Do with It?*, *supra* note 32, at 1948.

1. Effects of Circumcision

Immediate effects of the mildest form of FGM include pain, hemorrhaging, and shock due to sudden blood loss and unexpected, unimaginable pain.⁹⁵ Removing the clitoris involves cutting across the clitoral artery, which supplies blood to the erectile tissue of the clitoris.⁹⁶ Because this artery has a strong flow and high pressure, it must be packed tightly or closed with a suture to stop the bleeding.⁹⁷ If the suture or packing slips, hemorrhaging could result.⁹⁸ If the bleeding is very severe, it could lead to death.⁹⁹

Because anesthesia is rarely used in performing FGM, the woman or girl often experiences severe pain that can lead to shock.¹⁰⁰ Even when local anesthesia is used, pain quickly returns and may last for weeks.¹⁰¹ When no anesthesia is used, the woman or girl may struggle, which could result in inadvertent cutting.¹⁰² As a result, an intended clitoridectomy may become an excision.¹⁰³ Additionally, if the practitioners try to hold the woman or girl down while she is struggling and writhing from pain, she may fracture her clavicle, femur, or humerus.¹⁰⁴

Moreover, use of unsterilized tools may cause urinary infections or blood poisoning.¹⁰⁵ Infections are common and vary in degree from a superficial film of pus, to an ulcerating wound, to a general toxic infection if the bacteria reaches the blood stream.¹⁰⁶ Unsterilized tools can promote tetanus infection, which is usually fatal.¹⁰⁷ Moreover, use of the same unsterilized tools on many females, some of whom are HIV positive, may cause transmission of the AIDS virus.¹⁰⁸

As a result of the circumcision, the woman or girl may have pain, swelling, and inflammation of the front of the vulva.¹⁰⁹ This lends to

⁹⁵ KOSO-THOMAS, *supra* note 33, at 25.

⁹⁶ TOUBIA, *supra* note 44, at 13.

⁹⁷ *Id.*

⁹⁸ *Id.*

⁹⁹ *Id.*

¹⁰⁰ *Id.* at 14.

¹⁰¹ Slack, *supra* note 81, at 451.

¹⁰² *Id.*

¹⁰³ *Id.*

¹⁰⁴ KOSO-THOMAS, *supra* note 33, at 26.

¹⁰⁵ *Id.* at 25.

¹⁰⁶ TOUBIA, *supra* note 44, at 13.

¹⁰⁷ *Id.*

¹⁰⁸ *Id.*

¹⁰⁹ *Id.* at 14.

acute urinary retention which is exacerbated by pain and burning of urine on the open and raw wound, fear of passing urine through raw genitalia, a damaged urethra, or fused labia.¹¹⁰ Urine retention increases the victim's pain and discomfort and may cause urinary infection and back pain from pressure on the kidneys.¹¹¹

2. Effects of Excision and Infibulation

The immediate effects of infibulation are similar to those of clitoridectomies. The complications are compounded, however, especially with infibulation, because infibulation requires more cutting, so there is a greater chance of bleeding and hemorrhaging.¹¹² Additionally, the area of the infibulated wound is larger, increasing the risk of infection and abscess.¹¹³ Because the female's legs are bound together, she is forced to be inactive, and her excrement is trapped within her bandages.¹¹⁴ Urine retention is more common because the skin is sewn together, obstructing passage of urine and blood, making urination painful for weeks.¹¹⁵

Complications may be long term, particularly for an infibulated female.¹¹⁶ Among the most frequent long term health problems are: repeated urinary infection; stones in the urethra and the bladder due to obstruction and repeated infections; vaginal abscesses; kidney infections; and eventual sterility.¹¹⁷ The woman may have Keloid scars¹¹⁸ that grow so large that they obstruct walking.¹¹⁹ She may also have dermoid cysts¹²⁰ that become as large as grapefruits, requiring surgical removal.¹²¹ Blood clots may form, requiring the woman to dislodge the clots with her fingernails.¹²²

¹¹⁰ KOSO-THOMAS, *supra* note 33, at 26.

¹¹¹ TOUBIA, *supra* note 44, at 14.

¹¹² *Id.*

¹¹³ *Id.*

¹¹⁴ Slack, *supra* note 81, at 451.

¹¹⁵ TOUBIA, *supra* note 44, at 14.

¹¹⁶ *See id.*

¹¹⁷ *Id.*; Slack, *supra* note 81, at 452.

¹¹⁸ Keloid scars result from hardened tissue that builds up from skin that has lost its elasticity. Slack, *supra* note 81, at 452.

¹¹⁹ *Id.*

¹²⁰ Dermoid cysts are caused by skin cells becoming embedded in the scar tissue. TOUBIA, *supra* note 44, at 14.

¹²¹ *Id.*; DORKENOO & ELWORTHY, *supra* note 42, at 8.

¹²² DORKENOO & ELWORTHY, *supra* note 42, at 8. The authors go on to tell about Doctor Ollivier (a military doctor in Djibouti) who encountered:

An infibulated woman is likely to have pain during sexual intercourse.¹²³ She must undergo recurring disinfibulations and reinfibulations, beginning on her wedding night, when the “hood” is cut open to allow penetration.¹²⁴ In Somalia, for example, a husband may use his fingers, a knife, or a razor to enlarge his wife’s opening.¹²⁵ During each child-birth, she may have to be disinfibulated to allow passage of the child.¹²⁶ Labor may be prolonged and obstructed as a result, and lack of oxygen to the fetus could lead to brain damage.¹²⁷ An American gynecologist explained that in poor countries where women give birth far from hospitals, “the baby can explode out of that tiny opening and tear the mother every which way, into her anus and bladder. She could end up with feces coming out her vagina.”¹²⁸ As a result of the recurring disinfibulations and reinfibulations, the former female genital area evolves into tough scar tissue resembling cured hide.¹²⁹

The circumcised female may suffer emotional or psychological harm in addition to physiological harm.¹³⁰ The pain of FGM is present at every stage of her life.¹³¹ She suffers anxiety prior to the operation, and terror when seized by a trusted family member.¹³² Even after the procedure, the woman suffers recurring pain of menstruation, the agony of the first intercourse, and prolonged suffering during childbirth.¹³³

a 16-year-old girl [who was] brought to the hospital with unbearable abdominal pains. She had not menstruated for several months, and had not had intercourse, but her abdomen was swollen and sensitive, with the signs of a uterus in labour. She was infibulated, with a minuscule opening. Penetration would appear to have been impossible and there was no sign of beating of a foetal heart. Dr [sic] Ollivier performed a disinfibulation (opening of the scarred vulva), and released 3.4 litres of blackish foul-smelling blood.

Id.

¹²³ *Id.*

¹²⁴ TOUBIA, *supra* note 44, at 15.

¹²⁵ Slack, *supra* note 81, at 453.

¹²⁶ TOUBIA, *supra* note 44, at 15.

¹²⁷ KOSO-THOMAS, *supra* note 33, at 27. If the doctor is not familiar with circumcision, she may unnecessarily perform a Cesarean section. *Id.*

¹²⁸ Steed, *supra* note 89.

¹²⁹ TOUBIA, *supra* note 44, at 15.

¹³⁰ See HOSKEN, *Medical Facts and Summary*, *supra* note 29, at 4.

¹³¹ Judy Mann, *Torturing Girls is Not a Cultural Right*, WASH. POST, Feb. 23, 1994, at E13.

¹³² FEMALE CIRCUMCISION, EXCISION AND INFIBULATION, *supra* note 43, at 5. One seven-year-old Sudanese girl developed an “anxiety state” associated with lack of sleep and hallucinations caused by her fear of the operation. TOUBIA, *supra* note 44, at 19. Once the child was reassured that she would not be circumcised, her condition improved. *Id.*

¹³³ HOSKEN, *Medical Facts and Summary*, *supra* note 29, at 4.

Unfortunately, the physical problems and consequences of FGM have received most of the attention, while little attention has been paid to the psychological problems.¹³⁴ The permanent deprivation of a powerful sexual instinct, while the woman is forced to satiate the sexual satisfaction of males, has permanent psychological results.¹³⁵ In addition to trauma, she may worry about physical complications, or become fearful of sex.¹³⁶ She may have no outlet in which to express her feelings and sufferings.¹³⁷ When such pressures continue to build up, her "condition can progress to psychopathological levels."¹³⁸

II. CANADIAN POSITION

A. *IRB Guidelines*

Canada, like the United States, adopted the 1951 United Nations Convention relating to the Status of Refugees.¹³⁹ According to Article 1 A(2) of the 1951 Convention the term "refugee" shall apply to any person who:

[a]s a result of events occurring before 1 January 1951 and owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership in a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country; or who, not having a nationality and being outside the country of his former habitual residence as a result of such events, is unable or, owing to such fear, is unwilling to return to it.¹⁴⁰

Gender is not listed as one of the enumerated grounds. The definition of a Convention refugee in the Canadian Immigration Act similarly

¹³⁴ TOUBIA, *supra* note 44, at 19.

¹³⁵ See HOSKEN, *Medical Facts and Summary*, *supra* note 29, at 4.

¹³⁶ TOUBIA, *supra* note 44, at 19.

¹³⁷ *Id.*

¹³⁸ *Id.* For example a "30-year-old nomadic woman was diagnosed as having 'psychotic excitement.' She was childless and twice-divorced. The woman had a dermoid cyst the size of a tennis ball over her infibulation scar, which covered the entrance to the vagina. She had never told her family about this problem." *Id.*

¹³⁹ Refugee Convention, *supra* note 6.

¹⁴⁰ *Id.*

does not include gender as an enumerated ground for a well-founded fear of persecution.¹⁴¹

On March 9, 1993, the Canadian IRB issued guidelines to deal with women refugee claimants who fear gender-based persecution.¹⁴² The IRB noted that gender-related persecution is becoming more widely recognized as a form of persecution, which can and should be assessed by the CRDD.¹⁴³ When a woman claims a fear of persecution based on her gender, the CRDD needs to determine whether there is a link between gender, the feared persecution, and one or more of the defined grounds.¹⁴⁴ Women who bring gender-related claims raise four issues that the IRB Guidelines seek to address: (1) To what extent can women making a gender-related claim of fear of persecution successfully rely on any one, or combination, of the five enumerated grounds of the Convention refugee definition?¹⁴⁵ (2) Under what circumstances does sexual violence, or threat thereof, or other prejudicial treatment towards women constitute persecution as that term is jurisprudentially understood?¹⁴⁶ (3) What are the key evidentiary elements which decision-makers have to look to when considering a gender-related claim?¹⁴⁷ and (4) What special problems do women face when called upon to state their claim at refugee determination hearings, particularly when they have had experiences that are difficult and

¹⁴¹ According to § 2(1) of the Immigration Act, "Convention refugee" means any person who:

- (a) by reason of a well-founded fear of persecution for reasons of race, religion, nationality, membership in a particular social group or political opinion,
- (i) is outside the country of the person's nationality and is unable or, by reason of that fear, is unwilling to avail himself of the protection of that country, or
- (ii) not having a country of nationality, is outside the country of the person's former habitual residence and is unable or, by reason of that fear, is unwilling to return to that country. . . .

Immigration Act, R.S.C. ch. 28, § 2(1) (4th Supp. 1988).

¹⁴² See generally IRB Guidelines, *supra* note 5. The Canadian IRB is a governmental administrative agency that is comprised of three divisions including: (1) the Convention Refugee Determination Division (CRDD); (2) the Immigration Appeal Division (IAD); and (3) the Adjudication Division (AD). Kristine M. Fox, Note, *Gender Persecution: Canadian Guidelines Offer a Model for Refugee Determination in the United States*, 11 ARIZ. J. INT'L & COMP. L. 117, 123 n.124 (1994). The CRDD deals exclusively with the determination of refugee claims, the IAD hears appeals from any person denied entry to Canada or ordered removed, and the AD conducts inquiries regarding persons believed to be inadmissible or removable. *Id.*

¹⁴³ IRB Guidelines, *supra* note 5, at 1.

¹⁴⁴ *Id.*

¹⁴⁵ *Id.*

¹⁴⁶ *Id.*

¹⁴⁷ *Id.*

often humiliating to speak about?¹⁴⁸ Gender is not specifically listed as one of the grounds for establishing Convention refugee status, but the definition may be properly interpreted to protect women who demonstrate a well-founded fear of gender-related persecution by reason of any one, or combination of, the enumerated grounds.

1. The Extent to which the Claimant Can Rely on One of the Convention Grounds

Before the Refugee Board can determine the applicable grounds, it must first identify the nature of the persecution feared by the woman.¹⁴⁹ There are four broad categories of women claimants. These include: (1) fear based on one of the five enumerated Convention grounds (race, religion, nationality, social group, or political opinion);¹⁵⁰ (2) fear for reasons related to kinship;¹⁵¹ (3) fear resulting from severe discrimination due to gender;¹⁵² and (4) fear as a consequence for transgressing or failing to conform to gender-discriminating laws and practices (customs or religion).¹⁵³

Gender persecution arguably can be tied to membership in a particular social group.¹⁵⁴ The Canadian IRB recognizes that there is increasing international support for applying the particular social group ground to women's claims based on a fear of persecution solely by reason of their gender.¹⁵⁵ In fact, the Executive Committee of the

¹⁴⁸ IRB Guidelines, *supra* note 5, at 1.

¹⁴⁹ *Id.*

¹⁵⁰ *Id.* Although the substantive analysis does not vary as a function of gender, the nature of the harm feared and procedural issues at the hearing may vary as a function of the claimant's gender. *Id.*

¹⁵¹ This category includes women who fear persecution because of the status, activities, or views of their family members. *Id.* Such persecution may involve violence or harassment against women (who are not themselves accused of any misbehavior) to pressure them to reveal information about the whereabouts or political activities of their family members. IRB Guidelines, *supra* note 5, at 3.

¹⁵² *Id.* The discrimination can be by public authorities or at the hands of private citizens from whose actions the state is unwilling or unable to protect the claimant. *Id.* With respect to refugee law, the discrimination may amount to persecution if it results in substantially prejudicial consequences and if it is imposed on account of any one or combination of the statutory grounds for persecution. *Id.*

¹⁵³ *Id.* The religious or customary laws and practices single out women and place them in a more vulnerable position than men, thus creating precedent to a gender-defined social group. IRB Guidelines, *supra* note 5, at 3. Violations by a woman can range from choosing her own spouse over an arranged marriage, to wearing make-up, or exposing hair. *Id.*

¹⁵⁴ See *id.* at 5.

¹⁵⁵ *Id.*

United Nations High Commissioner for Refugees (UNHCR) has recognized that states are free to adopt an interpretation that women asylum-seekers who face harsh or inhuman treatment may be considered as a particular social group within the meaning of Article 1 A(2) of the 1951 Refugee Convention.¹⁵⁶ Moreover, the UNHCR Handbook¹⁵⁷ describes a particular social group as one that: “[n]ormally comprises persons of similar background, habits or social status. A claim to fear of persecution under this heading may frequently overlap with a claim to fear of persecution on other grounds, i.e. race, religion or nationality.”¹⁵⁸

According to the IRB Guidelines, the fact that the particular social group consists of large numbers of the female population is irrelevant.¹⁵⁹ Like gender, other characteristics such as race, religion, nationality, and political opinion, are also shared by large numbers of people.¹⁶⁰ A large number of people in general cannot constitute a particular social group, but a group such as women who face FGM constitutes a particular social group because that group suffers or will suffer severe discrimination or harsh or inhuman treatment that distinguishes it from the general population.¹⁶¹ This is because refugee status is an individual remedy.¹⁶² Thus, the important consideration is that women face violence amounting to persecution because of their particular vulnerability as women in their societies, and because their governments do not adequately protect them.¹⁶³

2. The Circumstances in which Sexual Violence, or Threat thereof, or Other Prejudicial Treatment towards Women, Can Constitute Persecution

Once the nature of the persecution is identified, the CRDD must determine whether the feared harm is indeed persecution as contem-

¹⁵⁶ *Id.* (citing to *Conclusion No. 39 (XXXVI) Refugee Women and International Protection*, 1985).

¹⁵⁷ In order to guide the states, the Executive Committee of the High Commissioner's Programme issued the Handbook relating to procedures and criteria for determining refugee status. OFFICE OF THE UNITED NATIONS HIGH COMMISSIONER FOR REFUGEES, HANDBOOK ON PROCEDURES AND CRITERIA FOR DETERMINING REFUGEE STATUS (1979) para. iv. at 1 [hereinafter REFUGEE HANDBOOK]. The Handbook explains the definition of the term “refugee” based on knowledge accumulated by the High Commissioner's Office since the 1951 Convention entered into force on April 21, 1954. *Id.* para. v.

¹⁵⁸ *Id.* para. 77, at 19.

¹⁵⁹ IRB Guidelines, *supra* note 5, at 6.

¹⁶⁰ *Id.*

¹⁶¹ *See id.*

¹⁶² *Id.*

¹⁶³ *See id.*

plated for refugee status.¹⁶⁴ The circumstances surrounding women's fear of persecution are often unique to women.¹⁶⁵ Because the "existing bank of jurisprudence on the meaning of persecution is based on, for the most part, the experiences of male claimants . . . the definition has not been widely applied to female-specific experiences, such as infanticide, genital mutilation, bride-burning, forced marriage, domestic violence, forced abortion, or compulsory sterilization."¹⁶⁶ The IRB Guidelines direct that the ultimate assessment of persecution be based on whether the violence, experienced or feared, is a violation of a fundamental human right for a Convention ground, and if the violence results from a failure of state protection.¹⁶⁷

3. The Key Evidentiary Elements which Are Considered in a Gender-Related Claim

The third issue that the IRB Guidelines address is the evidentiary problems that may arise from a claim of gender-based persecution. The claimant must prove that she has a well-founded fear of persecution based on a Convention ground as opposed to a fear of random violence or random criminal activity perpetrated against her as an individual.¹⁶⁸ The CRDD assesses the claimant's particular circumstances in relation to her country's human rights record and the experiences of other similarly situated women.¹⁶⁹ Her claim cannot be rejected because she comes from a country where women are generally oppressed

¹⁶⁴ IRB Guidelines, *supra* note 5, at 7.

¹⁶⁵ *Id.*

¹⁶⁶ *Id.* The persecution occurs because they are female:

Every day, thousands of women are beaten in their homes by their partners, and thousands more are raped, assaulted and sexually harassed. And, there are the less recognized forms of violence: In Nepal, female babies die from neglect because parents value sons over daughters; in Sudan, girls' genitals are mutilated to ensure virginity until marriage; and in India, young brides are murdered by their husbands when parents fail to provide enough dowry. In all these instances, women are targets of violence because of their sex. This is not random violence; the risk factor is being female.

Id. at n.19 (quoting L. Heise, *Crimes of Gender*, 2 WORLDWATCH 12 (1989)).

¹⁶⁷ *Id.* at 7. In addition, the IRB Guidelines encourage reference to human rights instruments which frame international standards to recognize needs of women and what constitutes permissible conduct by a state towards women. IRB Guidelines, *supra* note 5, at 7. Specifically, these instruments are the Universal Declaration of Human Rights; International Covenant on Civil and Political Rights; International Covenant on Economic, Social and Cultural Rights; Convention on the Elimination of All Forms of Discrimination Against Women; Convention on the Political Rights of Women; and the Convention on the Nationality of Married Women. *Id.*

¹⁶⁸ *Id.* at 8.

¹⁶⁹ *Id.*

and where her fear of persecution is not identifiable to her based on a set of individualized facts.¹⁷⁰ Moreover, the CRDD must be aware that a gender-related claim involves threats of sexual violence at the hands of authorities or those not susceptible to the authorities. As a result, the woman may find it difficult to substantiate her claim with statistical data on the incidence of sexual violence in her country.¹⁷¹ The CRDD also considers evidence which indicates that the state was aware of the sexual violence and condoned it, or that the state did nothing to prevent its occurrence.¹⁷²

4. Special Problems that Women Face when Testifying at Refugee Determination Hearings

The last issue addressed by the IRB Guidelines deals with some of the problems female claimants may experience, such as demonstrating their trustworthiness, when testifying at a determination hearing.¹⁷³ The IRB Guidelines recognize that women who are victims of sexual assault or violence may suffer from Rape Trauma Syndrome.¹⁷⁴ To alleviate any difficulties, CRDD members are directed to exhibit extreme sensitivity in these situations and if necessary, to utilize Refugee Hearing Officers who are specially trained to work with women who are victims of violence.¹⁷⁵

B. *Canadian Caselaw as Applied to IRB Guidelines*

1. Results of the First Year Since Implementation

The IRB Guidelines demonstrate Canada's leadership role in formally addressing the rights of refugee women.¹⁷⁶ Human rights organizations have praised the guidelines as an important trend other countries should follow because they acknowledge that women experience

¹⁷⁰ *Id.*

¹⁷¹ IRB Guidelines, *supra* note 5, at 8.

¹⁷² *Id.*

¹⁷³ *Id.* at 9.

¹⁷⁴ *Id.*

¹⁷⁵ *Id.* In contrast, one United States judge, listening to an El Salvadoran woman's testimony of repeated gang-rapes by guerrillas, actually clipped his fingernails while the woman covered her face with her hands. Deborah Sontag, *Asking for Asylum in U.S., Women Tread New Territory*, N.Y. TIMES, Sept. 27, 1993, at A13.

¹⁷⁶ *First Anniversary of Guidelines on Women Refugee Claimants*, IMMIGRATION AND REFUGEE BOARD, NEWS RELEASE, March 9, 1994.

different kinds of persecution than men.¹⁷⁷ In the first year since the release of the guidelines, the IRB identified approximately 350 gender-related claims.¹⁷⁸ Of the 150 finalized claims, seventy percent resulted in a granting of refugee status.¹⁷⁹ For example, defined social groups included: "Bulgarian women vulnerable to wife abuse by men with government influence;" "Ecuadorian women subject to wife abuse;" "Kenyan woman;" and "raped, single females with a child born out of wedlock."¹⁸⁰

A factor in all the cases where women were granted gender-related refugee status was inadequate government protection.¹⁸¹ For example, one Honduran claimant was abused by her former common-law husband who threatened to kill her even after she had left her country.¹⁸² The IRB panel considered documentary evidence and found that the Honduran state was unable to offer protection to the claimant because the Honduran laws were inadequate and because the government was unwilling to enact measures which would offer protection to victims of spousal abuse.¹⁸³ The CRDD found the claimant to be in a particular social group of "Honduran women subject to wife abuse," and found that she had a well-founded fear of persecution.¹⁸⁴ Likewise, the panel granted refugee status to a Russian claimant based on her membership in a social group consisting of "Russian women who are victims of spousal abuse."¹⁸⁵ In the panel's view, the development of the law had not reached a stage where the claimant or a like citizen could have confidence in police protection.¹⁸⁶

The CRDD also considered the treatment that a female claimant may face if she returns to her country of origin.¹⁸⁷ For example, a Chinese claimant had violated China's one-child policy which led to a forced abortion, deprivation of her business license, refusal of an employment

¹⁷⁷ *Id.*

¹⁷⁸ *Id.*

¹⁷⁹ *Id.*

¹⁸⁰ IMMIGRATION AND REFUGEE BOARD LEGAL SERVICES, SUMMARIES OF GENDER-RELATED DECISIONS OF THE IMMIGRATION AND REFUGEE BOARD OF CANADA, MARCH 1993 TO JANUARY 1994, 3, 5, 16, 23 (1994) [hereinafter IRB SUMMARIES].

¹⁸¹ See generally *id.*

¹⁸² *Id.* at 9.

¹⁸³ *Id.*

¹⁸⁴ *Id.*

¹⁸⁵ IRB SUMMARIES, *supra* note 180, at 24.

¹⁸⁶ *Id.*

¹⁸⁷ *Id.* at 4.

identity card, and pressure to undergo sterilization.¹⁸⁸ The panel found that the Chinese claimant had grounds to fear persecution if she were to return to China.¹⁸⁹ Namely, she would likely be forced to undergo sterilization.¹⁹⁰

Similarly, the CRDD found that if a certain Pakistani claimant was forced to return to Pakistan, she would face prejudicial treatment before the law.¹⁹¹ The claimant was sexually assaulted by a man belonging to a rival political group.¹⁹² She was treated for her injuries, but did not disclose the sexual assault, and asked her mother not to tell her father.¹⁹³ The claimant feared that her father might have her killed to protect the family honor, especially because she was pregnant as a result of the assault.¹⁹⁴ In reaching its decision the panel noted that the *Hudood* Ordinances, Islamic penal laws, weigh heavily on women.¹⁹⁵ Consequently, the panel found that the claimant would be prejudiced by the law, and would face potential physical harm and possible death if she were to return to Pakistan.¹⁹⁶ The claimant was granted refugee status because of her membership in a particular social group.¹⁹⁷

2. The *Ward* Decision—Canada's Social Group

In *Attorney General v. Ward*, the Supreme Court of Canada held that the appellant, a former member of a paramilitary terrorist organization in Northern Ireland, was not a member of a particular social group.¹⁹⁸ The appellant Ward was born in Northern Ireland in 1955 and voluntarily joined the Irish National Liberation Army (INLA) in 1983.¹⁹⁹ Ward's first assignment as an INLA member was to guard two of the organization's hostages at a farmhouse in the Republic of Ire-

¹⁸⁸ *Id.*

¹⁸⁹ *Id.*

¹⁹⁰ IRB SUMMARIES, *supra* note 180, at 4.

¹⁹¹ *Id.* at 23.

¹⁹² *Id.*

¹⁹³ *Id.*

¹⁹⁴ *Id.*

¹⁹⁵ To prove sexual assault by the Ordinances, the woman must obtain the confession of the perpetrator of the assault, or the testimony of four adult male Muslim witnesses to the act of penetration. IRB SUMMARIES, *supra* note 180, at 23. If she fails to prove sexual assault, or if she does not file charges and becomes pregnant, she is charged with adultery. *Id.*

¹⁹⁶ *Id.*

¹⁹⁷ *See id.*

¹⁹⁸ 103 D.L.R. 4th 1, 37 (1993).

¹⁹⁹ *Id.* at 5.

land.²⁰⁰ When Ward learned that the hostages were to be executed, he secretly resolved to release the innocent hostages because of his “moral conscience.”²⁰¹ The INLA suspected Ward, who subsequently was confined and tortured, and sentenced to death in a kangaroo court.²⁰²

Ward was also arrested by the police for his terrorist participation and served three years in prison.²⁰³ In order to protect him from the INLA members after he served his time, the prison chaplain, with the assistance of the police, helped Ward reach Canada.²⁰⁴ Ward arrived in Toronto in December, 1985 and claimed Convention refugee status in May, 1986 based on a fear of persecution because of his membership in a particular social group—the INLA.²⁰⁵

The Minister of Employment and Immigration determined that Ward was not a Convention refugee; but after a re-determination, the Immigration and Appeal Board found that he was a refugee.²⁰⁶ Finally, the Supreme Court heard Ward’s appeal.²⁰⁷ The Court identified three possible categories of social groups: (1) groups defined by an innate or unchangeable characteristic; (2) groups whose members voluntarily associate for reasons so fundamental to their human dignity that they should not be forced to forsake the association; and (3) groups associated by a former voluntary status, unalterable due to its historical performance.²⁰⁸ Notably, for FGM claimants, the court stated that the first category would “embrace individuals fearing persecution on such bases as gender. . . .”²⁰⁹ The Supreme Court held that the appellant did not fall into any of these groups.²¹⁰ Furthermore, his fear was not based on his membership in the terrorist organization, but was based on his individual conduct.²¹¹ The court further held, however, that Ward could qualify for his political opinion, and remanded his case for further findings.²¹²

²⁰⁰ *Id.*

²⁰¹ *Id.*

²⁰² *Id.*

²⁰³ *Ward*, 103 D.L.R. 4th at 5.

²⁰⁴ *Id.* at 6.

²⁰⁵ *Id.*

²⁰⁶ *Id.*

²⁰⁷ *Id.*

²⁰⁸ *Ward*, 103 D.L.R. 4th at 33–34.

²⁰⁹ *Id.* at 34.

²¹⁰ *Id.* at 37.

²¹¹ *Id.* at 38.

²¹² *Id.* at 40, 45.

3. The Case of Khadra Hassan Farah

On May 10, 1994 the IRB granted refugee status to Khadra Hassan Farah and her two children.²¹³ The CRDD found that Farah feared persecution on account of her membership in a particular social group: "women."²¹⁴ Farah's daughter was also granted refugee status because "she is a female and a minor that . . . fears persecution in the form of female genital mutilation in Somalia today."²¹⁵ The CRDD also found Farah's son to be in a particular social group, namely, "minors," who had a fear of persecution in Somalia by reason of his membership in that particular social group.²¹⁶

Farah and her children, a ten-year-old girl and a seven-year-old boy arrived in Canada on October 29, 1993, and subsequently claimed to have a well-founded fear of persecution on grounds of membership in a particular social group.²¹⁷ The CRDD heard their case on May 10, 1994 in order to determine whether the claimants were Convention refugees as defined in section 2(1) of the Immigration Act.²¹⁸ The panel examined the gender-related evidence and applied it to each of the claimants, in accordance with the IRB Guidelines and relevant international standards.²¹⁹

Farah testified that her family was from the Isaaq tribe and lived in Burao, in northern Somalia.²²⁰ She further testified that her marriage was full of conflict and acrimony, with many arguments over her desire to become more independent.²²¹ She had asked for a divorce, but her parents opposed it, and subsequently, her husband repeatedly beat her and her daughter.²²² Despite the abuse, she remained with her husband because she feared he would carry through with his threats of taking her children away from her.²²³ In fact, in 1992, Farah's husband abducted her eldest son, from whom she had not heard since.²²⁴ He then divorced her.²²⁵

²¹³ *Farah case*, *supra* note 1, at 7, 11, 13.

²¹⁴ *Id.* at 7.

²¹⁵ *Id.* at 11.

²¹⁶ *Id.* at 13.

²¹⁷ *Id.* at 1.

²¹⁸ *Farah case*, *supra* note 1, at 1; Immigration Act, R.S.C. ch. 28, § 2(1) (4th Supp. 1988).

²¹⁹ *See generally Farah case*, *supra* note 1.

²²⁰ *Id.* at 1.

²²¹ *Id.* at 2.

²²² *Id.*

²²³ *Id.*

²²⁴ *Farah case*, *supra* note 1, at 2.

²²⁵ *Id.* at 2-3.

At the time of the hearing Farah's husband lived in Somaliland and had strong ties to the government.²²⁶ Farah stated that it would be impossible for her to escape control of her former husband if she returned to Somaliland, especially because her own family no longer resided there.²²⁷ Moreover, she testified that fathers in Somalia automatically gain custody of their children when there is a divorce.²²⁸ Farah stated that she feared she would lose her two remaining children, and that she would be "destroyed" and it would be "better for her to be dead" should that happen.²²⁹

Farah could not only lose custody of her daughter, but she would be powerless to prevent FGM from being performed on her.²³⁰ Farah explained that she had undergone the excruciating procedure when she was eight years old, and described her terror and the resulting health problems relating to menstruation, conception, and childbirth once she reached adulthood.²³¹ Farah also testified that if she were to lose custody of her son, she would lose all contact with him.²³²

Based on the evidence, the CRDD found that each claimant had a well-founded fear of persecution based on membership in a particular social group, and hence qualified as a refugee.²³³ The panel first addressed Farah's claim and viewed her fear of losing custody of her two minor children under Sharia law in Somaliland as an issue based on gender.²³⁴ The CRDD noted that the Somali state has adopted a "hardline Islamic stance" on women's rights, which is opposed by the majority of educated women in the region.²³⁵ The panel further noted that women are harshly subordinated to men in Somalia, that they are

²²⁶ *Id.* at 3, 7.

²²⁷ *Id.* at 3.

²²⁸ *Id.*

²²⁹ *Farah case*, *supra* note 1, at 3.

²³⁰ *Id.* at 6.

²³¹ *Id.* at 3, 9–10; *see supra* note 28 and accompanying text. In her Personal Information Form (PIF), Farah stated:

During my stay in Canada, both my children had become acculturated to Canadian life: My daughter, . . . in particular enjoys the broad horizons of opportunity and freedom allowed to women in Canada. If she were to return to Somalia, she would be traumatized first by the infibulation and then by the severely restrictive role in which Somali women are placed by custom and by shariat, the Islamic law.

Id. at 3.

²³² *Id.* at 3–4.

²³³ *Farah case*, *supra* note 1, at 4.

²³⁴ *Id.*

²³⁵ *Id.* (quoting, *Somaliland: Women Fighting for Their Rights*, Inter Press Service, Mar. 26, 1992).

forced to give their children to their husbands if they divorce, and men and that women are not given equal rights.²³⁶

The CRDD found that Somalia violated Farah's internationally protected rights as a parent.²³⁷ While Somalia's "National Charter" incorporated international human rights instruments such as the Universal Declaration of Human Rights (UDHR), the charter subjugates the international liberties to Islamic Law.²³⁸ Sharia law, which dictates that divorced women automatically lose their children, discriminate against woman like Farah.²³⁹ In particular, the CRDD found this aspect of Sharia law violated Article 16 of UDHR which states: "Men and women of full age, without any limitation due to race, nationality or religion, have the right to found a family. They are entitled to equal rights in marriage, during marriage and at its dissolution."²⁴⁰

In addition to an international rights violation, the IRB found that Farah would suffer psychological trauma should she lose custody of her two remaining children, which would constitute "serious harm" in the Convention refugee sense.²⁴¹ Importantly, the CRDD noted that Farah would be unable to prevent her daughter from suffering FGM.²⁴² Moreover, Farah would be unable to seek protection from her ex-husband because of his connection to government officials.²⁴³ The panel followed the *Ward* decision, which provided categories for defining membership in a particular social group, including "groups defined by an innate or unchangeable characteristic" such as gender.²⁴⁴ Consequently, the CRDD found Farah to be a Convention refugee because she feared persecution on account of her membership in a particular social group: "women."²⁴⁵

Second, the CRDD found the minor female claimant, Farah's daughter, to have a fear of persecution based on the widespread practice of FGM on young girls in Somalia.²⁴⁶ Again the panel concluded in applying the IRB Guidelines that the issues were based on gender.²⁴⁷

²³⁶ *Id.* at 4–5.

²³⁷ *Id.* at 6.

²³⁸ *Farah* case, *supra* note 1, at 5.

²³⁹ *Id.*

²⁴⁰ *Id.*

²⁴¹ *Id.* at 6.

²⁴² *Id.*

²⁴³ *Farah* case, *supra* note 1, at 7.

²⁴⁴ *Id.*; see *supra* discussion part II.B.2.

²⁴⁵ *Farah* case, *supra* note 1, at 7.

²⁴⁶ *Id.*

²⁴⁷ *Id.* at 8. The panel also considered the United Nations Convention on the Rights of the Child since the claimant was a minor. *Id.*

The CRDD found that in Somalia, "infibulation is practiced on all females, almost without exception," and is performed by older women with no knowledge of anatomy.²⁴⁸ The CRDD looked at the typical consequences to a girl's physical and emotional health.²⁴⁹ The panel also considered Farah's painful and humiliating experience.²⁵⁰

Following the IRB Guidelines, the panel used international human rights instruments to weigh the seriousness of the genital harm feared by the minor claimant.²⁵¹ If she were forced to undergo FGM, her rights to personal security would be "grossly infringed" in contravention of Article 3 of the UDHR ("Everyone has the right to life, liberty and the security of person.").²⁵² Furthermore, FGM would violate the U.N. Convention on the Rights of the Child, which protects children from cruelty and torture.²⁵³ The panel rightfully accepted FGM as a torturous custom violating Article 24 of the Convention of the Rights of the Child which states that parties "shall take all effective and appropriate measures with a view to abolishing *traditional practices prejudicial to the health of children*."²⁵⁴

Given the U.N. violation and the widespread practice of FGM in the country, the CRDD was satisfied that the Somali government would not protect the minor claimant from the "physical and emotional ravages of FGM."²⁵⁵ Although there are reports of African countries attempting to curtail the practice, not enough has been done, especially given the urgency and magnitude of the problem.²⁵⁶ Pursuant to *Ward*, the panel found that the minor claimant was a member of two particular social groups: "women" and "minors."²⁵⁷ "It is by reason of the fact that she is a female and a minor that the claimant fears persecution in the form of female genital mutilation in Somalia today."²⁵⁸ Hence, the minor female claimant was found to be a Convention refugee.²⁵⁹

²⁴⁸ *Id.*; FRAN P. HOSKEN, THE HOSKEN REPORT: GENITAL AND SEXUAL MUTILATION OF FEMALES 26, 32 (3d ed. 1982).

²⁴⁹ *Farah* case, *supra* note 1, at 9; see *supra* discussion parts I.A–D.

²⁵⁰ See *Farah* case, *supra* note 1, at 9–10.

²⁵¹ *Id.* at 10.

²⁵² *Id.*

²⁵³ *Id.*

²⁵⁴ *Id.* at 10–11 (emphasis added).

²⁵⁵ *Farah* case, *supra* note 1, at 11.

²⁵⁶ *Id.*

²⁵⁷ *Id.*

²⁵⁸ *Id.*

²⁵⁹ *Id.*

Lastly, the minor male claimant was held to be a Convention refugee.²⁶⁰ The panel again followed *Ward* and found him to be in a particular social group, "minors," based on the "innate or unchangeable characteristic" of being under the majority age.²⁶¹ Because of his fear of persecution, being forcibly removed from the care and nurture of his mother, he was a member of that particular social group.²⁶²

III. UNITED STATES POSITION

A. *United States Guidelines and Policy*

1. 1951 Convention

In 1968, the United States signed on to the 1967 Protocol Relating to the Status of Refugees.²⁶³ The Protocol incorporated Articles 2 through 34 of the 1951 United Nations Convention Relating to the Status of Refugees.²⁶⁴ Nearly a decade and a half later, Congress incorporated the United States Protocol obligations under the Refugee Act of 1980,²⁶⁵ giving the Attorney General discretionary authority to grant political asylum to any person who meets the statutory definition of refugee.²⁶⁶ The Immigration and Naturalization Act defines a refugee as:

any person who is outside any country of such person's nationality or, in the case of a person having no nationality, is outside any country in which such person last habitually resided, and who is unable or unwilling to return to, and is unable or unwilling to avail himself or herself of the protection of, that country because of persecution or a well-founded fear of persecution on account of age, religion, nationality, membership in a particular social group, or political opinion. . . .²⁶⁷

The female applicant must first prove fear of persecution, but doing so is difficult for female refugee claimants because persecution is not

²⁶⁰ *Farah* case, *supra* note 1, at 13. The panel was guided by the international standards articulated in the United Nations Convention on the Rights of the Child. *Id.* at 12.

²⁶¹ *Id.* at 13.

²⁶² *Id.* at 11, 13.

²⁶³ Protocol Relating to the Status of Refugees, Jan. 31, 1967, 19 U.S.T. 6223, 606 U.N.T.S. 267.

²⁶⁴ *Id.* at 268.

²⁶⁵ 8 U.S.C. § 1101.

²⁶⁶ See 8 U.S.C. § 1158(a).

²⁶⁷ 8 U.S.C. § 1101(a)(42)(A).

clearly defined in the Convention and because gender-specific forms of abuse are not usually thought to constitute "persecution."²⁶⁸ Since asylum law in the United States has been concerned mostly with traditionally male-dominated activities, there is little caselaw dealing specifically with gender-related claims of women.²⁶⁹ Courts generally find it difficult to accept rape and other forms of sexual abuse as violence, and tend to ascribe personal motivations to perpetrators when the harm is sexual.²⁷⁰ The female claimant's second hurdle, to prove that the feared persecution is "based on one of the enumerated grounds," is also difficult due to the absence of "gender" in the Convention definition as a basis of persecution. Consequently, women bring claims under a political opinion theory,²⁷¹ or they attempt to make their claims based on membership in a particular social group in order to meet the definition of a refugee.²⁷² Even if the woman meets the definitional requirements, the granting of asylum is discretionary.²⁷³ Hence the statutory definition of refugee and the wide discretion given to judges in adjudicating asylum claims fail to account for the unique problems that female asylum-seekers face.

a. *Gender-Specific Persecution*

In the UNHCR handbook for determining refugee status, the Commissioner notes that there is no universally accepted definition of "persecution," but states that, "serious violations of human rights . . .

²⁶⁸ See Nancy Kelly, *Gender-Related Persecution: Assessing the Asylum Claims of Women*, 26 CORNELL INT'L L.J. 625, 635, 643 (1993).

²⁶⁹ *Id.* at 636 (citations omitted).

²⁷⁰ *Id.* at 640-41. In *Klawitter v. I.N.S.*, the Sixth Circuit denied asylum to a Polish woman who had been blacklisted for refusing to join the Communist Party and sexually abused by a Polish government official. 970 F.2d 149, 151, 154 (6th Cir. 1992). Even though *Klawitter* stated that the perpetrator forced himself on her and threatened to destroy her career, and that other members of the secret police detained and abused her, the Immigration Judge and the BIA found that the perpetrator's acts were due to his personal interest in the applicant, and not an attempt to persecute her. *Id.* at 151-53.

²⁷¹ Kelly, *supra* note 268, at 637. For example, in *Lazo-Majano v. I.N.S.*, a Salvadoran woman who had been continually sexually abused by an army officer was granted asylum by the Ninth Circuit. 813 F.2d 1432, 1433, 1436 (9th Cir. 1987). She was granted asylum based on her political opinion that men do not have the right to dominate women. *See id.* at 1436.

²⁷² See, e.g., *Khalaj v. Cole*, No. 94-2429, 1995 U.S. App. LEXIS 1861 at *3 (8th Cir. Feb. 1, 1995) (Iranian woman opposed to the strictures imposed by the Iranian government); *Fatin v. I.N.S.*, 12 F.3d 1233, 1237 (3d Cir. 1993) (upperclass Iranian women who supported the Shah of Iran, a group of educated Westernized free-thinking individuals); *Valle-Zometa v. I.N.S.*, No. 88-7174, 1990 U.S. App. LEXIS 24955 at *19 (9th Cir. Dec. 5, 1990) (body-retrievers).

²⁷³ 8 U.S.C. § 1158(a).

[could] also constitute persecution.”²⁷⁴ Ultimately, the individual nations such as the United States interpret and define persecution within their own refugee determination procedures. With no concrete definition, the female asylum applicant’s difficulty in proving a “well-founded fear of persecution” is compounded due to the many different types of persecution that women may face.²⁷⁵ Sexual assault, punishment for transgressing cultural mores, domestic violence, sex discrimination, and FGM are examples of action that are generally not considered “persecution” in the general sense of the word.²⁷⁶

Such gender-based persecution is perceived by judges to be private abuse rather than the political persecution which qualifies an individual for asylum in the United States.²⁷⁷ Yet rape and other sexual abuses are often used in civil conflicts as a means of exerting power and control over local populations.²⁷⁸ Countries of refuge may hesitate in finding FGM a persecutory practice for fear of offending some nations or being seen as culturally insensitive.²⁷⁹ As the Canadian IRB Guidelines recognize, FGM, while private in nature, is governmental persecution when a country does not recognize it as abuse, or enforce its own laws against the practice.²⁸⁰ Moreover, mutilation cannot be considered culture, but instead should be classified as torture.²⁸¹

b. *Women as a Particular Social Group*

Even if the woman is able to identify her fear of FGM as “persecution,” she must prove the persecution is based on one of the Convention’s five enumerated grounds. Unfortunately, it may be difficult or impossible to establish that FGM is based upon her race, religion, nationality, membership in a particular social group, or political opinion. Given that gender is not enumerated in the definition of refugee, the woman must try to establish herself as a member of a “particular

²⁷⁴ REFUGEE HANDBOOK, *supra* note 157, para. 51, at 14.

²⁷⁵ FOX, *supra* note 142, at 125.

²⁷⁶ *See id.*

²⁷⁷ *See* Klawitter v. I.N.S., 970 F.2d 149, 152 (6th Cir. 1992); Emily Love, *Recent Developments: Equality in Political Asylum Law: For a Legislative Recognition of Gender-Based Persecution*, 17 HARV. WOMEN’S L.J. 133, 141 (1994).

²⁷⁸ *Id.* at 142.

²⁷⁹ *See id.*

²⁸⁰ *See* IRB Guidelines, *supra* note 5, at 6.

²⁸¹ Love, *supra* note 277, at 142. To mutilate is defined as: “1. to deprive a (person or animal) of a limb or other essential part. 2. to injure, disfigure, or make imperfect by removing or irreparably damaging parts.” THE RANDOM HOUSE COLLEGE DICTIONARY 880 (1988).

social group,” one who will be subjected to FGM if forced to return to her country of origin.

Since the Refugee Act was passed, there has been confusion surrounding the determination of what groups are “social groups” under the Act.²⁸² United States legislation does not define “particular social group.”²⁸³ This is surprising considering that the “social group” category was intended to be a catch-all for different types of persecution.²⁸⁴ Various commentators have argued that the social group category is intended to include all those persecuted for reasons other than race, religion, nationality, or political opinion.²⁸⁵ Others have argued that the ambiguity of the social group category is intended to protect any group singled out by a foreign government for victimization, that “the contours of a social group for purposes of refugee status are limited only by the imagination of the persecutor.”²⁸⁶ United States courts are divided over the limit of the social group category. The Board of Immigration Appeals (BIA) has required that social groups be defined by an immutable characteristic common to each member.²⁸⁷ The Ninth Circuit has promulgated its own standard for determining membership in a social group based on a voluntary association between group members, which has been followed by the Eighth Circuit.²⁸⁸ Many judges, perhaps due to the lack of any definite standards, have resorted to unelaborated proclamations or have avoided the issue altogether.²⁸⁹

B. *The Social Group in the United States*

1. The BIA

The BIA, an executive agency, bears the initial responsibility for interpreting the Refugee Act.²⁹⁰ Although the BIA has not clearly defined the term “social group,” it has placed an outer limit on the

²⁸² T. David Parish, *Membership in a Particular Social Group Under the Refugee Act of 1980: Social Identity and the Legal Concept of the Refugee*, 92 COLUM. L. REV. 923, 932 (1992).

²⁸³ See 8 U.S.C. § 1101.

²⁸⁴ Arthur C. Helton, *Persecution on Account of Membership in a Social Group as a Basis for Refugee Status*, 15 COLUM. HUM. RTS. L. REV. 39, 41–42, 45 (1983).

²⁸⁵ Parish, *supra* note 282, at 932.

²⁸⁶ *Id.* at n.46; Helton, *supra* note 284, at 66.

²⁸⁷ *In re Acosta*, 19 I&N Dec. 211, 233 (BIA Mar. 1, 1985).

²⁸⁸ *Safaie v. I.N.S.*, 25 F.3d 636, 649 (8th Cir. 1994); *Sanchez-Trujillo v. I.N.S.*, 801 F.2d 1571, 1576 (9th Cir. 1986).

²⁸⁹ Parish, *supra* note 282, at 932.

²⁹⁰ *Id.* at 934.

category, recognizing only those groups possessing an immutable characteristic.²⁹¹ Applicants before the BIA have claimed refugee status on the basis of membership in a broad range of purported social groups. The BIA has recognized some social groups such as gay men and lesbians, former members of the national police of El Salvador, and those with ties to the deposed Somoza government of Nicaragua.²⁹²

Despite the frequency with which social group claims have come before the BIA, the Board has offered little direction as to what properties identify a social group cognizable under the Refugee Act. The only significant guidance was provided in *In re Acosta*.²⁹³ In *Acosta*, an El Salvador native presented evidence that leftist guerrillas in El Salvador had repeatedly threatened him with death.²⁹⁴ The guerrillas objected to his work as a taxi driver for the cooperative COTAXI, and had killed five COTAXI drivers.²⁹⁵ On appeal, the BIA held that the claimant's fear of persecution was not well-founded and that the feared persecution was not motivated by any of the five enumerated categories under the Act.²⁹⁶ The Board went on to define "persecution on account of membership in a particular social group" to mean:

persecution that is directed toward an individual who is a member of a group of persons all of whom share a common, immutable characteristic. The shared characteristic might be an innate one such as sex, color, or kinship ties, or in some circumstances it might be a shared past experience such as former military leadership or land ownership.²⁹⁷

The requirement of immutability means that those within a legitimate social group are either unable by their own actions, or as a matter of conscience should not be required to change the characteristic that offends their persecutor.²⁹⁸ This interpretation, as a valid exercise of congressionally delegated authority, is binding upon Article III courts.²⁹⁹ While nothing in *Acosta* forbids the imposition of further

²⁹¹ *Id.*

²⁹² *Id.* at 936 (citations omitted).

²⁹³ *In re Acosta*, 19 I&N Dec. 211, 233 (BIA Mar. 1, 1985).

²⁹⁴ *See id.* at 213, 216-17.

²⁹⁵ *See id.* at 216-17.

²⁹⁶ *See id.* at 234-35.

²⁹⁷ *Id.* at 233.

²⁹⁸ *Acosta*, 19 I&N Dec. at 233.

²⁹⁹ Parish, *supra* note 282, at 934. In *INS v. Cardoza-Fonseca*, the Court addressed the question of how much deference to accord the BIA interpretation of "well-founded fear," a term found in the same sentence of the Refugee Act as "membership in a particular social group." 480 U.S. 421, 448 (1987); 8 U.S.C. § 1101(a)(42). The Court held that "the courts must respect the interpre-

limits, Article III courts may not grant social group status to any group excluded by the BIA's immutability test.³⁰⁰

2. The Ninth Circuit

In *Sanchez-Trujillo v. I.N.S.*, the applicants claimed "relief from deportation on account of their membership in a purportedly persecuted social group of young, working class males who have not served in the military of El Salvador."³⁰¹ The Ninth Circuit rejected this claim, finding the group to be neither persecuted nor a cognizable social group.³⁰² The court carefully evaluated the statutory language and determined that the social group category was limited in scope: "The statutory words 'particular' and 'social' which modify 'group' indicate that the term does not encompass every broadly defined segment of a population. . . ." And in order to avoid "render[ing] the definition of 'refugee' meaningless" it is necessary to limit the social group category to "cohesive, homogenous group[s]."³⁰³ The *Sanchez-Trujillo* court defined a social group as:

[a] collection of people closely affiliated with each other, who are actuated by some common impulse or interest. Of central concern is the existence of a voluntary associational relationship among the purported members, which imparts some common characteristic that is fundamental to their identity as a member of that discrete social group.³⁰⁴

Although the standard is explicit, it is also narrow and demanding, and requires a high degree of homogeneity for recognition as a social group.³⁰⁵

tation of the agency to which Congress has delegated the responsibility for administering the statutory program." *Id.* at 448.

³⁰⁰ Parish, *supra* note 282, at 939.

³⁰¹ *Sanchez-Trujillo v. I.N.S.*, 801 F.2d 1571, 1572 (9th Cir. 1986).

³⁰² See *id.* at 1576-77.

³⁰³ *Id.* at 1576 (citations omitted), 1577 (quoting the written decision of the Immigration Judge in *Sanchez-Trujillo*'s original INS hearing).

³⁰⁴ *Id.* at 1576. This model of social group can be broken down into four parts: (1) close affiliation; (2) a "common impulse or interest" upon which this affiliation is based; (3) voluntary association, and (4) the existence of a common trait by which group members are distinguishable from the general population. Parish, *supra* note 282, at 941.

³⁰⁵ *Id.* For a discussion of the court's flawed reasoning and the conflicts between the Ninth Circuit's test and the BIA test, as well as world standards, see *id.*

3. Lack of Clear-Cut Criteria

The United States courts have not provided clear-cut, workable, or adequate criteria for determining social group status. The BIA has not adopted a clear definition, but has only delineated an outer limit.³⁰⁶ While *Sanchez-Trujillo* proffers one solution to the problem of defining a social group category, it has only been adopted by the Eighth Circuit.³⁰⁷ Other circuits have either remained silent on this issue, or have reached conclusions as to the cognizability of particular social groups without revealing the criteria upon which these conclusions are based.³⁰⁸

As shown by caselaw, the courts have diverged in defining what constitutes a "particular social group."³⁰⁹ The BIA and the Third Circuit have held that a particular social group refers to a group of persons all of whom share a common, immutable characteristic.³¹⁰ Whatever the common characteristic that defines the group, it must be one that the members cannot change, or should not be required to change because it is fundamental to their individual identities or consciences.³¹¹ The Eighth and Ninth Circuits, on the other hand, have held that a particular social group implies a collection of people closely affiliated with each other, who are actuated by some common impulse or interest.³¹² For these courts, the principle concern is a voluntary associational relationship among the purported members, which imparts some common characteristic that is fundamental to their identity as a member of that discrete social group.³¹³ Finally, the Second Circuit has held that a particular social group is comprised of individuals who possess some fundamental characteristic in common which serves to distinguish them in the eyes of the persecutor, or in the eyes of the outside world in general.³¹⁴ The Second Circuit em-

³⁰⁶ See *In re Acosta*, 19 I&N Dec. 211, 233 (BIA Mar. 1, 1985).

³⁰⁷ Parish, *supra* note 282, at 944; *Safaie v. I.N.S.*, 25 F.3d 636, 640 (8th Cir. 1994).

³⁰⁸ Parish, *supra* note 282, at 944.

³⁰⁹ See, e.g., *Safaie*, 25 F.3d at 640; *Fatin v. I.N.S.*, 12 F.3d 1233, 1239 (3d Cir. 1993); *Gomez v. I.N.S.*, 947 F.2d 660, 664 (2nd Cir. 1991); *Sanchez-Trujillo v. I.N.S.*, 801 F.2d 1571, 1576 (9th Cir. 1986); *Acosta*, 19 I&N Dec. at 233.

³¹⁰ *Fatin*, 12 F.3d at 1239; *Acosta*, 19 I&N Dec. at 233.

³¹¹ *Fatin*, 12 F.3d at 1240; *Acosta*, 19 I&N Dec. at 233.

³¹² *Safaie*, 25 F.3d at 640; *Sanchez-Trujillo*, 801 F.2d at 1576.

³¹³ *Safaie*, 25 F.3d 636, 640; *Sanchez-Trujillo*, 801 F.2d at 1576.

³¹⁴ *Gomez v. I.N.S.*, 947 F.2d 660, 664 (2d Cir. 1991). The Gomez court denied political asylum to a Salvadoran woman who argued that she was a member of a particular social group that consisted of women who had been beaten or raped by Salvadoran guerrilla forces. *Id.* at 663-64.

phasized that the distinguishable traits must be recognizable and discrete.³¹⁵

4. Women as a Social Group

The courts diverge on the issue of whether women, because of their innate characteristic, i.e. their sex, constitute a particular social group.³¹⁶ The Third Circuit and the BIA recognize that sex, by itself, is an immutable, common characteristic which satisfies the definition of a particular social group.³¹⁷ In *Fatin*, the Third Circuit stated that the alien satisfied the first element, identifying with a particular social group, in her claim that she had a well-founded fear that she would be persecuted in Iran simply because she is a woman.³¹⁸

The Eighth, Ninth, and Second Circuits, however, have found this category overbroad, holding that sex, by itself, is not sufficient to constitute a particular social group.³¹⁹ The courts reasoned that to accept such a broad definition of a particular social group would open the floodgates, and all women living in countries such as Iran would be eligible for asylum, thus undermining congressional intent to limit asylum relief to only those facing unusual circumstances.³²⁰ In *Safaie*, the claimant asserted that Iranian women, by virtue of their innate characteristic (their sex) and the harsh restrictions placed upon them, constituted a particular social group.³²¹ The court stated, "we believe this category is overbroad, because no fact finder could reasonably conclude that all Iranian women had a well-founded fear of persecu-

The court upheld the BIA's decision (that Gomez failed to demonstrate that the guerrillas would harm her based on her association with a particular social group) and denied political asylum because she did not identify any characteristics other than youth and gender that would identify her to a persecutor. *Id.* at 664. "[B]roadly-based characteristics such as youth and gender will not by itself endow individuals with membership in a particular social group," essentially requiring members of a social group to possess recognizable and discrete traits. *Id.* The court did, however, suggest that such a claim may be granted. *Id.* A woman who had been "repeatedly and systematically brutalized by particular attackers [could] assert a well-founded fear of persecution." *Gomez*, 947 F.2d at 664.

³¹⁵ *Id.*

³¹⁶ See *id.*; *Safaie v. I.N.S.*, 25 F.3d 636, 640 (8th Cir. 1993); *Fatin v. I.N.S.*, 12 F.3d 1233, 1240 (3d Cir. 1993).

³¹⁷ See *Fatin*, 12 F.3d at 1240; *In re Acosta*, 19 I&N Dec. 211, 233 (BIA Mar. 1, 1985).

³¹⁸ See *Fatin*, 12 F.3d at 1240.

³¹⁹ See *Safaie*, 23 F.3d at 640; *Gomez*, 947 F.2d at 664; *Sanchez-Trujillo v. I.N.S.*, 801 F.2d 1571, 1574-77 (9th Cir. 1986).

³²⁰ See *Safaie*, 25 F.3d at 640; *Gomez*, 947 F.2d at 664.

³²¹ *Safaie*, 25 F.3d at 640.

tion based solely on their gender.”³²² Similarly, in *Gomez*, the court found that possession of broadly-based characteristics such as youth and gender will not by itself endow individuals with membership in a particular social group.³²³

Finally, the courts seem to agree that a discrete sub-group of women who share a characteristic, so fundamental that they cannot change or should not be required to change, and which distinguishes them from all other women in their countries, can constitute a particular social group.³²⁴ In the Third Circuit’s ruling in *Fatin*, the court recognized that the subgroup of Iranian women who “*refuse to conform* to the government’s gender-specific laws and social norms” may constitute a particular social group.³²⁵ The court emphasized the limited scope of this subgroup and stressed that a woman’s opposition which was so profound that she would choose to suffer severe consequences rather than conform, was indicative that this characteristic was so fundamental to her identity or conscience that she ought not be required to change.³²⁶ Similarly in *Safaie*, the court agreed with the Third Circuit that a group of women who refused to conform and whose opposition was so profound that they would choose to suffer the severe consequences of noncompliance may satisfy the definition.³²⁷ Even if the claimant satisfies the first element by identifying with a particular social group as defined, she must still establish her membership in this discrete subgroup of women, and subsequently prove that she has a well-founded fear of persecution on account of her membership in the group.

C. *The Oluloro Decision*

On March 23, 1994, Immigration Judge Kendall Warren granted Lydia Omowunmi Oluloro’s application for suspension of deportation.³²⁸ Judge Warren concluded that Ms. Oluloro had established a strong likelihood that her daughters would be subjected to FGM if they were returned to Nigeria.³²⁹ The possible subjection to FGM amounted

³²² *Id.*

³²³ *Gomez*, 947 F.2d at 664.

³²⁴ *Safaie*, 25 F.3d at 640; *Fatin v. I.N.S.*, 12 F.3d 1233, 1241 (3d Cir. 1993).

³²⁵ *See* 12 F.3d at 1241 (emphasis in original).

³²⁶ *See id.*

³²⁷ *See Safaie*, 25 F.3d at 640.

³²⁸ *In re Lydia Omowunmi Oluloro*, In Deportation Proceedings, Portland Oregon, No. A72 147 491 at 20 (Mar. 23, 1994) (oral decision).

³²⁹ *Id.* at 17.

to “extreme hardship” to Oluloro’s American-citizen children, thereby meeting the statutory criteria.³³⁰

At the time of the proceedings, Oluloro was a thirty-two-year-old, unmarried female, native and citizen of Nigeria who had entered the United States in 1986 as a non-immigrant visitor.³³¹ Her ex-husband, Emanuel Oluloro was a lawful permanent resident of the United States.³³² The claimant and her husband had two daughters, born in the United States in 1987 and 1989.³³³ Their marriage was violent, and Oluloro testified that her former husband beat and raped her.³³⁴

Oluloro testified that she had been circumcised at the age of four.³³⁵ All her sisters were circumcised, and witnessing the procedure being performed on other girls in Nigeria had been traumatic for her.³³⁶ She did not want the procedure performed on her daughters because “she did not like the practice, she felt it was dangerous, could have side effects, and made intercourse painful.”³³⁷

Oluloro further testified that if she were to return to Nigeria, her ex-husband’s family would harm her.³³⁸ In addition, she would have to find employment and would be forced to leave her daughters with relatives.³³⁹ If so, her daughters would almost certainly be circumcised because her family, particularly her sister, firmly believed in FGM.³⁴⁰

In order to qualify for a suspension of deportation, Oluloro had to demonstrate that she had been physically present in the United States for the seven years preceding the application, that she had been a person of good moral character during that period, and that her deportation would result in extreme hardship to her or her U.S.-citizen or lawful-permanent-resident spouse, parent, or child.³⁴¹ Oluloro met the first two requirements.³⁴² As for the issue of extreme hardship, the most important factor was that Oluloro’s two daughters were U.S.

³³⁰ *Id.*

³³¹ *Id.* at 1.

³³² *Id.* at 6.

³³³ *In re Oluloro*, No. A72 147 491 at 7.

³³⁴ *Id.* Charges were brought against her ex-husband, but they were later dropped. *Id.*

³³⁵ *Id.*

³³⁶ *Id.* at 8.

³³⁷ *Id.*

³³⁸ *In re Oluloro*, No. A72 147 491 at 10.

³³⁹ *Id.*

³⁴⁰ *Id.*

³⁴¹ *Id.* at 14.

³⁴² *Id.* at 15–16.

citizens.³⁴³ The court noted that although the two girls could adapt if taken to Nigeria, they would have lower quality sanitation facilities, medical and educational institutions, and they would be separated from their father.³⁴⁴

Importantly, Judge Warren noted that Oluloro established a strong likelihood that her daughters would be subjected to FGM if returned to Nigeria.³⁴⁵ The court held that the risk of FGM amounted to extreme hardship to the American-citizen children, and that therefore the statutory criteria had been met.³⁴⁶ Judge Warren also noted that the court attempts to respect the traditions of other societies, but FGM “is cruel and serves no known medical purpose.”³⁴⁷ The court also stated that although the Nigerian government does not promote FGM, Nigerian State Department reports indicated that FGM is very common and is a deeply-ingrained cultural tradition.³⁴⁸ “Regardless of the origins and motives of [FGM,] . . . the court finds that it is cruel, painful, and dangerous.”³⁴⁹ Also, because her husband is the leader of her tribe and “has shown himself to be a very dominating and forceful person,” it is “plausible that he put much pressure on her.”³⁵⁰ Accordingly, the court concluded that Oluloro’s application for suspension of deportation should be granted.³⁵¹

IV. ANALYSIS

A. *Proposed United States Guidelines*

Given that in many cases the refugee claims of women are based on gender-related circumstances, the Women’s Refugee Project of Cambridge, Massachusetts, drafted the “Guidelines for Women’s Asylum Claims” to be considered by the INS.³⁵² Like their Canadian predecessor, the proposed guidelines recognize that women asylum claimants may apply for protection based on grounds that are particular to their gender.³⁵³ The persecution may be a *type* of harm that is particular to

³⁴³ *In re Oluloro*, No. A72 147 491 at 16.

³⁴⁴ *Id.*

³⁴⁵ *Id.* at 17.

³⁴⁶ *Id.*

³⁴⁷ *Id.* at 16.

³⁴⁸ *In re Oluloro*, No. A72 147 491 at 17.

³⁴⁹ *Id.*

³⁵⁰ *Id.* at 19–20.

³⁵¹ *Id.* at 20.

³⁵² See U.S. Guidelines, *supra* note 12.

³⁵³ *Id.* at 2.

the claimant's gender, such as FGM, or the persecution may be *because* of the applicant's gender.³⁵⁴ Even though the United States did not have regulations or guidelines dealing with gender-related persecution at the time of drafting, and there was little caselaw in this area, asylum applications based on gender were increasingly being submitted.³⁵⁵ By using the Women's Refugee Project's guidelines, or similar guidelines, women applicants claiming fear of persecution of FGM would be less likely to slip through the male-claimant dominated refugee system.

Similar to the IRB Guidelines, the proposed United States Guidelines are divided into three sections. The first section analyzes the individual components of the INS's refugee definition, highlighting special gender-related considerations in the evaluation of persecution.³⁵⁶ The second section addresses evidentiary considerations that recognize that female asylum applicants face special difficulties of proof.³⁵⁷ The final section deals with procedural considerations, such as credibility issues and the ability to effectively communicate the trauma that the woman has faced.³⁵⁸

The first part of the proposed United States Guidelines asks if the particular form of treatment constitutes persecution.³⁵⁹ Women and girls often face physical harm or abuse which are specific to their gender, including rape, sexual abuse, and FGM.³⁶⁰ The Refugee Act does not define persecution, but it has been held to include suffering inflicted upon a person in order to punish that individual for possessing a belief or characteristic the persecutor seeks to overcome,³⁶¹ and "the infliction of suffering or harm upon those who differ in a manner regarded as offensive."³⁶² Forms of harm that amount to persecution include: serious physical harm; loss of freedom; other serious violations of basic human rights as defined by international human rights instruments; discriminatory treatment; or a combination of numerous harms which when considered cumulatively creates a well-founded fear of persecution.³⁶³

³⁵⁴ *Id.* (emphasis in original).

³⁵⁵ Kelly, *supra* note 268, at 633-34 (citations omitted).

³⁵⁶ U.S. Guidelines, *supra* note 12, at 3-11.

³⁵⁷ *Id.* at 3, 11-12.

³⁵⁸ *Id.* at 3, 12-13.

³⁵⁹ *Id.* at 5.

³⁶⁰ *Id.*

³⁶¹ *In re Acosta*, 19 I&N Dec. 211 (BIA Mar. 1, 1985).

³⁶² *Kovac v. I.N.S.*, 407 F.2d 102, 107 (9th Cir. 1969).

³⁶³ U.S. Guidelines, *supra* note 12, at 4.

Because most cases in which the meaning of persecution has been considered have been those of men, United States courts have not explicitly recognized FGM, which is inherently female-related, as a form of persecution.³⁶⁴ The fact that FGM is widespread in many nations should not detract from the claim of an individual woman.³⁶⁵ Rather, the relevant issue for the courts is whether the woman applying for asylum was subjected to or reasonably fears being subjected to the violence with no recourse to state protection.³⁶⁶ Similarly, an asylum applicant does not have to establish that the persecution she fears exists nationwide if it would have been unreasonable for her to seek refuge in another part of the country.³⁶⁷

The proposed United States Guidelines also analyze how a woman's gender can affect her claim on one of the statutory grounds of political opinion,³⁶⁸ race,³⁶⁹ religion,³⁷⁰ and nationality.³⁷¹ If she cannot fulfill those categories, a woman who fears FGM may attempt to base her claim on membership in a particular social group.³⁷² The "particular social group" category has a broader application than the other Convention grounds.³⁷³ According to the UNHCR Handbook, this category normally comprises of persons of similar background, habits, or social status.³⁷⁴

Second, in evaluating a gender-based claim of persecution, the adjudicator must recognize that women face special difficulties of proof.³⁷⁵ The applicant's own testimony may be the only evidence

³⁶⁴ See *id.* at 5.

³⁶⁵ See *id.*

³⁶⁶ *Id.*

³⁶⁷ *Id.* at 6.

³⁶⁸ U.S. Guidelines, *supra* note 12, at 6. Political opinion should be understood to include an opinion regarding the treatment or status of women within her country, culture or social, religious or ethnic group. *Id.*

³⁶⁹ *Id.* The Guidelines note that there may be cases where a woman claims persecution or a fear of persecution because of her race and her gender. *Id.*

³⁷⁰ *Id.* A woman may face harm for her religious beliefs or practices. If there is a state religion or a state-run religious hierarchy, a woman who chooses not to subscribe to or follow the precepts of that religion may be subject to persecution for religious reasons. U.S. Guidelines, *supra* note 12, at 6–7. Moreover, if she refuses to fill her assigned roles and consequently fears punishment, she may claim persecution based on religious grounds. *Id.* at 7.

³⁷¹ *Id.* Such a case may arise if the woman loses her citizenship because she marries a foreign national. *Id.*

³⁷² See *id.*

³⁷³ See REFUGEE HANDBOOK, *supra* note 157 para. 77, at 19.

³⁷⁴ See *id.*

³⁷⁵ U.S. Guidelines, *supra* note 12, at 11.

available.³⁷⁶ There is no requirement of external corroboration, although where it is available, the claimant should present documentary evidence of particular incidents.³⁷⁷

Lastly, the proposed United States Guidelines recommend procedural considerations, similar to the Canadian IRB Guidelines.³⁷⁸ The woman may be embarrassed to talk about her fear and the mutilations that go on in her family.³⁷⁹ She may be reluctant to disclose experiences of her trauma.³⁸⁰ Female asylum applicants who have suffered violence, such as FGM, may exhibit a pattern of symptoms referred to as Post Trauma Stress Disorder or Rape Trauma Syndrome that makes it difficult for them to testify.³⁸¹ Consequently, adjudicators may incorrectly find such women not to be credible when they are simply traumatized.³⁸² Undoubtedly, Farah and Oluloro's candor when talking about their FGM experiences helped to convince their adjudicators of the horrible persecution that their children would face. By following the guidelines, the courts and agencies will be better able to evaluate and interpret the real fear the claimants possess.

B. *A Step in the Right Direction*

United States asylum law followed Canada's lead and took a step in the right direction by recognizing the special needs of female asylum seekers from gender-based persecution. The INS accordingly adopted in large part the Women's Refugee Project's proposed guidelines. United States caselaw demonstrated that women's needs were overlooked: those who rape and beat were ascribed personal motivations, and cases similar to FGM were considered to be societal norms and traditions. Moreover, the courts were divided on the issue. While the BIA had defined membership in a social group, not all courts had followed that definition. Absent a clear mandate by Congress or the Supreme Court, lower courts were unlikely to adopt a uniform reading of the political opinion or social group category broad enough to include women under those delineated classifications.³⁸³ By recogniz-

³⁷⁶ *Id.*

³⁷⁷ *Id.*

³⁷⁸ *Id.* at 2.

³⁷⁹ *Id.* at 12.

³⁸⁰ See U.S. Guidelines, *supra* note 12, at 12.

³⁸¹ See *id.*

³⁸² *Id.*

³⁸³ Love, *supra* note 277, at 152.

ing gender-related persecution, Congress ensures that immigration judges and officials grant the protection of asylum to those women who face FGM in their home countries, without having to manipulate their circumstances in an attempt to fit that harm into an existing category.³⁸⁴ By issuing the guidelines, the United States recognizes that women may experience discrimination unique to their gender, and that in some cases such discrimination can meet the standards for refugee status.³⁸⁵

V. CONCLUSION

Given that the United Nations definition of refugee, which was adopted by the United States, lacks gender-related persecution as a grounds for determining refugee status, claims of many women are overlooked. A female claimant, like a male claimant, must demonstrate that she faces persecution, and that she faces that persecution because of her race, religion, nationality, political opinion, or membership in a particular social group. Meeting these requirements, however, may prove difficult or impossible for females. This is because her persecution may be because of her gender, or she may suffer a type of persecution particular to her gender. The international community has begun to recognize the plight of the female refugee claimant. Canada for example, adopted Refugee Guidelines to enable immigration panels to specially consider the circumstances relating to the female claimant. The Canadian Guidelines have allowed the CRDD to hold that FGM is a form of persecution and that women who face such mutilation are members of a particular social group. Moreover, interest groups like the Women's Refugee Project proposed guidelines that were largely adopted by the INS that will help United States immigration judges and officials evaluate persecution that is based on the applicant's gender. By using such guidelines, as did the IRB in the *Farah* case, a United States female claimant can more easily demonstrate that FGM is a form of persecution and that she is a member of a social group.

FGM is clearly gender-related persecution. A female is forced, by family and tradition, to have an intimate part of her body cut away. There is no medical, religious, sexual, or aesthetic reason for FGM. Instead, it is to subordinate and control the woman, and to deprive

³⁸⁴ See *id.* at 152–53.

³⁸⁵ Gains, *INS Eases Asylum Guidelines for Women*, *supra* note 11, at 13.

her of her sexuality and womanhood. The female characteristic is immutable and could easily fall under the *Acosta* definition. While the *Oluloro* decision was a step in the right direction, it was only a stay of deportation, and did not go as far as the *Farah* decision in determining that it was gender-related persecution. By following guidelines like the Canadian IRB Guidelines, or the newly adopted United States Guidelines, a United States immigration adjudicator can more easily recognize that FGM is gender-related persecution. A woman should not be forced to have her genitals sliced off, nor should she be forced by the United States to return to her country of origin to endure FGM. By following the newly issued gender-related guidelines, a woman at risk of FGM has a better chance of making a successful claim based on the Convention refugee definition. The adoption of such guidelines was definitely a step in the right direction.

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